United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

B P/S

76-1190

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

DAVID HAIRSTON,

Appellant.

Appeal from a Judgment of Conviction Rendered in the United States District Court for the Southern District of New York

APPELLANT'S BRIEF

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UNITED STATES OF AMERICA,

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ISSUES PRESENTED

1. *Whether appellant was entraped by the Drug Enforcement Agency as a matter of law.*

2. *Whether the verdict of the jury is contrary to the overwhelming weight of the evidence.*

STATEMENT PURSUANT TO RULE 28(a)(3)

A. *Preliminary Statement*

This appeal is from a judgment of the United Stated District Court for the Southern District of New York (Frankel, J.) rendered April 6, 1976 convicting appellant after trial by jury of the crime of unlawfully possessing with the intent to distribute, a Schedule I narcotic drug [21 USC §§812, 841(a)(1) and 841 (b)(1)(a)] and sentencing him on each of two counts to thirty (30) months imprisonment followed by a 3-year special parole term to run concurrently.

Timely notice of appeal was filed on April 12, 1976.

B. *Statement of Facts*

Appellant, together with his co-defendant Harry Hairston was charged in a two-count indictment, with unlawfully possessing with the intent to distribute a Schedule I narcotic drug on May 23 and May 30, 1975.

At trial appellant acknowledged that he distributed narcotics on the days in question, but he was induced to do this by a paid informant of the Drug Enforcement Agency.

LACK OF PREDISPOSITION

Appellant's defense was entrapment. He testified that he did not have predisposition to commit the crime. To support his position, appellant was able to point to several uncontested facts:

1. There wasn't any evidence to indicate that appellant was involved with narcotics prior to being convinced to participate by the informant.

2. There was not any evidence to indicate that appellant had any source of supply for narcotics other than the source arranged for him at the request of the informant.

3. There was not any evidence that appellant transferred any narcotic to anyone except the agent introduced to him by the informant.

4. There was no evidence that appellant had a predisposition to make the sales in question.

5. There was evidence of the appellant being induced to enter the narcotics business by the informant.

6. There was evidence that the informant had contact with the Drug Enforcement Agency and appellant prior to the first sale but there was not presented any evidence of predisposition on the part of appellant to commit this crime.

7. There was evidence that the informant was paid by the Drug Enforcement Agency.

8. There was evidence that the informant contacted appellant numerous times before the first sale and was being avoided by appellant before appellant was induced to make the first sale.

9. There was evidence that the informant contacted appellant numerous times before the second sale and was induced to make the second sale.

The entire case depended upon the jury being convinced that there was predisposition on the part of the appellant to commit the crime in question since the evidence of inducement and the informant's agency was uncontroverted. To do this, the government did not present any

evidence of prior activity of appellant to indicate this predisposition although they had him under surveillance prior to the sale. Instead they seem to rely upon presale taped conversations arranged by the informant for the appellant which indicates the appellant's disposition at the time immediately prior to the sale, but does not show his disposition prior to the time he was unduced to make the sale by the informant. The government also relied upon taped conversations subsequent to the last sale to build a general atmosphere of appellant's intention to commit the crime. It is the lack of evidence on appellant's predisposition to commit the crime when evidence of inducement is uncontroverted and the introduction at the trial of the conversations held subsequent to the last sale but not related to either sale are the areas which appellant claims as errors on this appeal.

D. TRIAL

Appellant a businessman without any criminal record met the informant Safwan Salam in the fall of 1974 through Robbie, a mutual friend. (T.224) Appellant indicated that he saw the informant again a few weeks later and was offered some cocaine which he refused. The Appellant did not see the informant again for almost a year until the Spring of 1975. At this time the informant indicated he had some good "coke" connections and asked the appellant if he was interested in investing any money. Again appellant said no (T.226) Then the informant began

to call frequently until appella t advised his employees not to let him know he was in (T.226) This was confirmed by one of his employees (T.346) Safwan, however, came by one day and offered appellant some cocaine which was refused, however, he was successful in borrowing some money which appeared to be the cord which bounded these two people together.

In attempting to collect the money loaned to informant, appellant was introduced to a supplier, (T.235) and was induced by informant to invest $6,000 in a shipment of cocaine which was to be brought into the country from South America by this supplier.(T.241) The informant had indicated that he would arrange a sale with a friend named Joe for the imported cocaine. (T.238) The cocaine was never brought into the country and the appellant's $6,000.00 was never returned. After this loss the informant approached appellant and advised him to locate a heroin supplier. (T.242) for his friend Joe. Appellant advised the informant that he had no such connection and did not want to become involved (T.242). The informant then advised appellant that the only possibility he had of recovering his $6,000.00 was through involvement. The informant then contacted Robbie the mutual friend who introduced them and requested that Robbie provide appellant with a heroin contact if he had one.

Robbie introduced appellant to such a contact on the pretense of

talking appellant to a party at the home of a fellow called Saul.

At Saul's home, appellant was introduced to two Turkish men who advised appellant that they had heroin available for sale and informed appellant if he was interested to contact Saul (T.246)

The informant now that he had been informed by Robbie that the appellant had heroin connections began to intesify his pressure on appellant offering him an opportunity to get his money back by just supplying the heroin to the informant's buyer whom he called Joe.

After many conversations with the informant concerning the possibility of making his money back, the appellant was convinced to speak with Joe and make a deal. Informant called Joe at the Drug Enforcement Agency's Office in Manhattan and spoke with Garfield Hammond who made arrangements with the appellant to purchase five ounces of heroin at $2,200.00 an ounce.

On May 23, 1975, appellant purchased five ounces of heroin from the Turks and sold three ounces to Garfield Hammond for $6,600.00.

After the first sale the informant started pressuring appellant to make other sale advising him that the only way he was going to get his $6,000.00 back was to earn it through these transactions (T.260) after a number of calls and request by the informant, the appellant purchased ten ounces from the Turk in order to supply eight ounces to Hammond. The reason he purchased ten ounces is because he could

only purchase in lots of five.

At this time informant advised him to mix or cut the heroin in order to increase his supply (T.261)

On May 30, 1975, the appellant sold eight ounces to Hammond for $17,600.00 and received the $600.00 owed him from the first sale, (T.263)

After the second sale, appellant had four ounces of heroin left and Garfield Hammond wanted to buy four kilos (T.265)

Appellant assured him he had the capability to provide this amount, however, this statement was made with the purpose of eventually selling Hammond the four ounces and terminating his activity (T.267)

When Garfield Hammond had determined after a few months that appellant did not have the capability to sell four kilos and that he had wasted over $24,000.00 of government money on appellant whom the paid informant had built up to be a large dealer with large contacts but who was not a dealer and had no contacts at all, he arrested appellant.

In his summation the prosecutor referred to appellant's apparent knowledge of the business based on his conversation with Garfield Hammond prior to the first sale to indicate predisposition.(T.428)

The court charged the jury on entrapment (T.448) however, it denied a request that the jury be advised that predisposition should only be considered by testimony of acts and conversations preceding the two sales and not by testimony of acts and conversations subsequent to the

second sale (T 459).

Appellant was convicted on all counts and his co-defendant was acquitted on the first count and convicted on the second count.

ARGUMENT

POINT I

APPELLANT WAS ENTRAPPED AS A MATTER OF LAW AND THE CASE SHOULD HAVE BEEN DISMISSED BY THE COURT

When there is entrapment as a matter of law, the case should be decided by the court. J. Roberts in his separate concurring opinion in Sorrells v. United States, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932) states:

> "Proof of entrapment at any stage of the case requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty. If in doubt as to the facts, it may submit the issue of entrapment to a jury for advice. But whatever may be the finding upon such submission the power and the duty to act remain with the court and not with the jury".

In the Sorrells case, the court indicated a few request were persistent solicitation while in the present case the government's informant had pursued appellant for many months in an attempt to recruit him in the narcotic business with the sole purpose of receiving financial payments from the government for providing them with a narcotic dealer.

When the government supplied the narcotic or any illegal element to the defendant it was held as a matter of law, there was entrapment. The sale of the narcotic in that case was made through the creative activity of the government the defendant would not have had the drug to sell, if the informant had not made it available. United States v. Bueno,

447 F.2d 903 (1971).

In this case, the government's informant made drugs available for sale to appellant on two occassions. The first occassion was the matter of the cocaine episode in which defendant invested $6,000.00 and when that did not materialize, the informant made it possible for appellant to meet a heroin supplier. The appellant gave the name and address of the suppliers at the trial to substantiate his testimony and the government never contradicted this testimony. The arranging of the contact for appellant to purchase narcotics was tantamount to providing the narcotics and it has been held as a matter of law if facts of that nature are true, the defendant cannot be convicted of the possession, handling and sale of heroin. United States v. Bueno, supra.

In the United States v. Chisum, 312 F. Supp. 1307 (1970) a motion to dismiss an indictment on the ground of entrapment was granted because the acts of the government agent in delivering and supplying the counterfeit bills to defendant constituted entrapment as a matter of law. In the few cases where the government furnished the defendant contraband which constituted the crime they mostly have held that this was an entrapment as a matter of law. Scott v. Commonwealth, 303 Ky 353, 197 S. W. 2d 771 (1946).

The court in People v. Strong, 21 Ill. 2d 320, 172 N.E. 2d,

765 (1961) stated: "We know of no conviction for sale of narcotics that has been sustained when the narcotics sold were supplied by an agent of the government. This is more than mere inducement. In reality, the government is supplying the sine qua non of the offense." In the United States v. Richard Russell, 98 S.Ct. 1637, 36 L.Ed. 2d 366 (1973), the court indicated that because the substance provided by the government agent to the defendants was legal and obtainable otherwise the law enforcement conduct stops far short of violating that "fundamental fairness, shocking to the universal sense of justice "mandated by the Due Process Clause of the Fifth Amendment. The court, however, implied in this statement that their position would have been different if the substance was illegal.

In Charles Hampton v. United States, 44 L.W. 4542 (1976) narcotics were supplied by the agent to the defendant and the court held that this would have been an entrapment as a matter of law if the result of ther governmental activity was to implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission. The court, however, stated that the entrapment could never be based on governmental misconduct in a case of that nature where the predisposition of the defendant to commit the crime was established.

The elements of entrapment are quite established. A defendant not predisposed to commit a crime must be induced to commit this crime by an agent of the government.

There was no question in this case that appellant was induced by the informant to make narcotic sales to the agent. There was nothing in appellant's past that would indicate he was involved or interested in the narcotic business.

The appellant was constantly telephoned and entreated by the informant to enter the narcotic business and for a long time appellant had rejected these invitations. The government cannot be permitted to contend that appellant is guitly of a crime where the government officials are the instigators of his conduct. The federal courts in sustaining the defense in such circumstances have proceeded in the view that the defendant is not guilty. Sorrells v. United State, *supra.*

The initial inducement was sufficient to apply to both sales. It does not make a difference that the sales for which petitioner was convicted occurred after a series of sales, they were not. independent acts subsequent to the inducement, but part of a course of conduct which was the product of the inducement. Sherman v. United States, *356 U.S. 369, 78 S.Ct. 819 2 L.Ed. 2d 848 (1958).*

Since the overwhelming indications are that appellant was induced to commit the crime, the burden was upon the government to show pre-

disposition.

This predisposition could be shown by proving one of the following three situations:

1. The accused was already engaged in "an existing course of similar criminal conduct";

2. The accused had already formed a design to commit the crime or similar crimes;

3. The accused was willing to do so as evidenced by ready complaisance. United States v. Becker, 62 F.2d 1007 (2 Cir. 1933).

There was not evidence presented by the government to meet this burden.

The testimony of the appellant could have been controverted by the informant, neither party produced the informant.

If the informant's testimony would tend to disprove the defendant's story it was up to the government to produce him. The defendant having testified to the facts which established a defense as a matter of law, the government has the duty to come forward with contrary proof. If it is to carry its ultimate burden of proving guilty beyond a reasonable doubt. United States v. Groessel, 440 F.2d 602 (5th Cir. 1971). United States v. Bueno, supra.

In this case, the government did implant the crime in the mind of the appellant and made arrangements to make it possible for him to get the narcotics and there was no predisposition on the part of appellant to commit the crime. Based on this, there is entrapment as a matter of law. The matter should have been disposed of by the court and not submitted to a jury.

ARGUMENT

POINT II

THE VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE

The jury verdict was against the weight of the evidence because the testimony of appellant went uncontroverted. So it was impossible for the Government to sustain their Burden of Proof.

The appellant had established that he was induced to make the sale of drugs.

There was not any evidence presented to establish the predisposition of the appellant to commit the crime.

THEREFORE, the government could not prove guilt beyond all reasonable doubt. United States v. Grocssel, supra.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED

Respectfully submitted,

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Dated: New York, N. Y.
June 11th, 19[illegible]

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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 14 day of June , 1976 at No. 1 St. Andrews Pl., NYC deponent served the within Brief upon U.S. Atty. 3 the Appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 14 day of June 1976

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978 1977